

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PTP ONECLICK, LLC,

Plaintiff,

v.

AVALARA, INC.,

Defendant.

No. 2:19-cv-00640-JLR

**MODIFIED  
AGREEMENT  
REGARDING  
DISCOVERY OF  
ELECTRONICALLY  
STORED  
INFORMATION AND  
[PROPOSED] ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information ("ESI") in this matter:

**A. General Principles**

1. An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as possible.

1 **B. ESI Disclosures**

2 The parties shall, on or before August 28, 2019, disclose the following:

3 1. Custodians. The five custodians most likely to have discoverable ESI in their  
4 possession, custody or control. The custodians shall be identified by name, title, connection to the  
5 instant litigation, and the type of the information under his/her control.

6 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared  
7 drives, servers, etc.), if any, likely to contain discoverable ESI.

8 3. Third-Party Data Sources. A list of third-party data sources, if any, likely  
9 to contain discoverable ESI (e.g. third-party email and/or mobile device providers, "cloud"  
10 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to preserve  
11 information stored in the third-party data source.

12 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable  
13 ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically  
14 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.  
15 P. 26(b)(2)(B).

16 **C. Preservation of ESI**

17 The parties acknowledge that they have a common law obligation to take reasonable and  
18 proportional steps to preserve discoverable information in the party's possession, custody or  
19 control. With respect to preservation of ESI, the parties agree as follows:

20 1. Absent a showing of good cause by the requesting party, the parties shall not  
21 be required to modify the procedures used by them in the ordinary course of business to back-  
22 up and archive data; provided, however, that the parties shall preserve all discoverable ESI in  
23 their possession, custody or control.

24 2. All parties shall supplement their disclosures in accordance with Rule 26(e)  
25 with discoverable ESI responsive to a particular discovery request or mandatory disclosure  
26 where that data is created after a disclosure or response is made (unless excluded under (C)(3)

1 or (D)(1)-(2) below).

2 3. Absent a showing of good cause by the requesting party, the following  
3 categories of ESI need not be preserved:

- 4 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 5 b. Random access memory (RAM), temporary files, or other ephemeral  
6 data that are difficult to preserve without disabling the operating system.
- 7 c. On-line access data such as temporary internet files, history, cache,  
8 cookies, and the like.
- 9 d. Data in metadata fields that are frequently updated automatically, such as  
10 last-opened dates (see also Section (E)(5)).
- 11 e. Back-up data that are substantially duplicative of data that are more  
12 accessible elsewhere.
- 13 f. Server, system or network logs.
- 14 g. Data remaining from systems no longer in use that is unintelligible on the  
15 systems in use.
- 16 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or  
17 from mobile devices (e.g., iPhone, iPad, Android, and Blackberry  
18 devices), provided that a copy of all such electronic data is routinely saved  
19 elsewhere (such as on a server, laptop, desktop computer, or "cloud"  
20 storage).

21 **D. Privilege**

22 1. With respect to privileged or work-product information generated after June 1,  
23 2018, parties are not required to include any such information in privilege logs.

24 2. Activities undertaken in compliance with the duty to preserve information are  
25 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

26 3. Information produced in discovery that is protected as privileged or work product  
shall be immediately returned to the producing party, and its production shall not constitute a  
waiver of such protection, if: (i) such information appears on its face to have been inadvertently  
produced or (ii) the producing party provides notice within 15 days of discovery by the  
producing party of the inadvertent production.

4. Privilege Log Based on Metadata. The parties agree that privilege logs shall

1 include a unique identification number for each document and the basis for the claim (attorney-  
2 client privileged or work-product protection). For ESI, the privilege log may be generated using  
3 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title  
4 and date created. Should the available metadata provide insufficient information for the purpose  
5 of evaluating the privilege claim asserted, the producing party shall include such additional  
6 information as required by the Federal Rules of Civil Procedure.

7 5. The parties agree that privilege logs shall be provided 30 days after the date  
8 agreed upon for final production in this matter.

9 **E. ESI Discovery Procedures**

10 1. On-site inspection of electronic media. Such an inspection shall not be permitted  
11 absent a demonstration by the requesting party of specific need and good cause or by agreement  
12 of the parties.

13 2. Search methodology. The parties shall timely attempt to reach agreement on  
14 appropriate search terms, or an appropriate computer- or technology-aided methodology, before  
15 any such effort is undertaken. The parties shall continue to cooperate in revising the  
16 appropriateness of the search terms or computer- or technology-aided methodology.

17 In the absence of agreement on appropriate search terms, or an appropriate computer- or  
18 technology-aided methodology, the following procedures shall apply:

19 a. A producing party shall disclose the search terms or queries, if any, and  
20 methodology that it proposes to use to locate ESI likely to contain discoverable information. The  
21 parties shall meet and confer to attempt to reach an agreement on the producing party's search  
22 terms and/or other methodology.

23 b. If search terms or queries are used to locate ESI likely to contain  
24 discoverable information, a requesting party is entitled to no more than 5 additional terms or  
25 queries to be used in connection with further electronic searches absent a showing of good cause  
26 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the

1 requesting party within 14 days of receipt of the producing party's production.

2 c. Focused terms and queries should be employed; broad terms or queries,  
3 such as product and company names, generally should be avoided. Absent a showing of good  
4 cause, each search term or query returning more than 250 megabytes of data is presumed to be  
5 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file  
6 types.

7 d. The producing party shall apply the above search terms on the emails and  
8 other ESI maintained by the custodians identified in accordance with paragraph B(1).

9 e. The parties' development and negotiation of search terms and queries for  
10 custodian email and other ESI shall not be grounds for the party to delay review, collection, or  
11 production of non-custodial or other documents that the producing party is able to identify and  
12 locate without the use of search terms.

13 3. Format. The parties agree that ESI will be produced to the requesting party with  
14 searchable text, in a format to be decided between the parties. Acceptable formats include, but are  
15 not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file),  
16 single-page TIFFs (only with load files for e-discovery software that includes metadata fields  
17 identifying natural document breaks and also includes companion OCR and/or extracted text  
18 files), and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily  
19 converted to image format, such as spreadsheet, database and drawing files, should be produced  
20 in native format. Each document image file shall be named with a unique Bates Number (e.g. the  
21 unique Bates Number of the page of the document in question, followed by its file extension).  
22 File names should not be more than twenty characters long or contain spaces. When a text-  
23 searchable image file is produced, the producing party must preserve the integrity of the  
24 underlying ESI, i.e., the original formatting, the metadata (as noted below) and, where applicable,  
25 the revision history. The parties shall produce their information in the following format: single-  
26 page images and associated multi-page text files containing extracted text or with appropriate

1 software load files containing all requisite information for use with the document management  
2 system (e.g., Concordance® or Summation®), as agreed to by the parties.

3 4. De-duplication. The parties may de-duplicate their ESI production across  
4 custodial and non-custodial data sources after disclosure to the requesting party.

5 5. Metadata fields. If the requesting party seeks metadata, the parties agree that only  
6 the following metadata fields need be produced: document type; custodian and duplicate  
7 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file  
8 path; date and time created, sent, modified and/or received; and hash value.

9 6. Hard-Copy Documents. If the parties elect to produce hard-copy documents in an  
10 electronic format, the production of hard-copy documents shall include a cross-reference file that  
11 indicates document breaks and sets forth the Custodian or Source associated with each produced  
12 document. Hard-copy documents shall be scanned using Optical Character Recognition  
13 technology and searchable ASCII text files shall be produced (or Unicode text format if the text  
14 is in a foreign language), unless the producing party can show that the cost would outweigh the  
15 usefulness of scanning (for example, when the condition of the paper is not conducive to scanning  
16 and will not result in accurate or reasonably useable/searchable ESI). Each file shall be named  
17 with a unique Bates Number (e.g. the Unique Bates Number of the first page of the corresponding  
18 production version of the document followed by its file extension).

1 DATED: August 20, 2019

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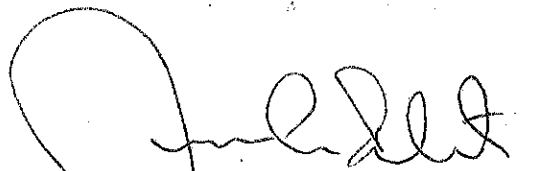
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**ORDER**

Based on the foregoing, IT IS SO ORDERED.

DATED: 21 August 2019



The Honorable James L. Robart  
UNITED STATES DISTRICT JUDGE